

against granting rescission. The absence of any one of these factors, however, will not necessarily be determinative of whether to grant rescission.

(5) *Factors not considered.* In determining whether to grant rescission, the Commissioner (or the Commissioner's delegate) will not consider doubt as to liability for, or collectibility of, the penalties.

(e) *Reports to the Securities and Exchange Commission (SEC)*—(1) *In general.* Under section 6707A(e), a taxpayer who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (or is required to file consolidated reports with another person) must disclose in periodic reports filed with the SEC the requirement to pay each of the following penalties:

(i) The penalty imposed by section 6707A(a) in the amount of \$200,000 for failure to disclose a listed transaction.

(ii) The accuracy-related penalty imposed by section 6662A(a) at the 30-percent rate determined under section 6662A(c) for a reportable transaction understatement with respect to which the relevant facts affecting the tax treatment of the reportable transaction were not adequately disclosed in accordance with regulations prescribed under section 6011.

(iii) The accuracy-related penalty imposed by section 6662(a) at the 40-percent rate determined under section 6662(h) for a gross valuation misstatement, if the taxpayer (but for the exclusionary rule of section 6662A(e)(2)(C)(ii)) would have been subject to the accuracy-related penalty under section 6662A(a) at the 30-percent rate determined under section 6662A(c).

(iv) The penalty described in paragraph (e)(3) of this section for failure to disclose in periodic reports filed with the SEC the requirement to pay any of the penalties described in paragraphs (e)(1)(i) through (iii) or (e)(3) of this section.

(2) *Manner and content of disclosure.* The Secretary may prescribe the manner in which disclosure of the requirement to pay the penalties identified in paragraph (e)(1) of this section must be made on reports filed with the SEC, including identification of the specific SEC form and section thereof in which

the taxpayer must make the disclosure as well as specification of the timing and contents of the disclosure, by publishing a revenue procedure or other guidance in the Internal Revenue Bulletin.

(3) *Penalty for failure to disclose in SEC filings.* Any taxpayer who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (or is required to file consolidated reports with another person) may be subject to a penalty in the amount of \$200,000 for each failure to disclose the requirement to pay a penalty identified in paragraphs (e)(1)(i) through (e)(1)(iii) of this section in the manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The taxpayer also may be subject to an additional penalty in the amount of \$200,000 for each failure to disclose a penalty arising under this section in the manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The penalty provided by this paragraph is not subject to rescission as described in paragraph (d) of this section.

(f) *Effective/applicability date*—(1) The rules of this section apply to disclosure statements that are due after September 11, 2008.

(2) The applicability of this section expires on or before September 9, 2011.

[T.D. 9425, 73 FR 52786, Sept. 11, 2008]

**§ 301.6708-1T Failure to maintain list of investors in potentially abusive tax shelters (temporary).**

The following questions and answers issued under section 6708 of the Internal Revenue Code of 1954, as added by section 142 of the Tax Reform Act of 1984 (Pub. L. 98-369; 98 Stat. 683), relate to the penalty for failure to maintain a list of investors in potentially abusive tax shelters.

**Q-1:** What penalties are provided with respect to the failure properly to maintain a list of persons who acquire interests in potentially abusive tax shelters?

**A-1:** Any organizer (as defined in A-5 of § 301.6112-1T) of a tax shelter (as defined in A-3 of § 301.6112-1T) or seller (as defined in A-6 of § 301.6112-1T) of interests in a tax shelter who fails to meet any requirement imposed by section

6112 regarding the requirement to maintain a list of persons who have acquired interests in a tax shelter shall pay a penalty of \$50 for each investor with respect to whom there is such a failure, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. For example, if an organizer who is required to maintain a list identifying each of 100 persons who acquired interests in a tax shelter fails to maintain the list, the organizer will be liable for a penalty of \$5,000 ( $\$50 \times 100$  persons), unless the organizer can show the failure was due to reasonable cause and not due to willful neglect. As another example, if a seller is required to maintain a list identifying each of 100 persons who acquired interests in a tax shelter from the seller and fails properly to maintain such list by omitting the TIN of each person, the seller will be liable for a penalty of \$5,000 ( $\$50 \times 100$  persons), unless the seller can show the failure was due to reasonable cause and not due to willful neglect.

Q-2: If an organizer or seller properly maintains a list, but fails to make the list available to the Internal Revenue Service upon request, will the organizer or seller be subject to a penalty?

A-2: Yes. A penalty applies if an organizer or seller fails to meet any requirement imposed by section 6112, including the requirement, upon request, to make the list available to the Internal Revenue Service as soon as practicable, but in any event within 10 calendar days. (See A-21 of § 301.6112-1T). The amount of the penalty is \$50 for each person required to be on the list at the time of the request by the Internal Revenue Service. Assume, for example, that an organizer of a tax shelter properly maintains a list of 200 persons who have acquired interests in a tax shelter and that the Internal Revenue Service requests the organizer to provide the list. If the organizer fails to provide the list to the Internal Revenue Service as soon as practicable (as required by A-21 of § 301.6112-1T), or in a form that enables the Internal Revenue Service to obtain the required information without undue delay or difficulty (as required by A-16 of § 301.6112-1T), the organizer will be liable for a penalty of \$10,000 ( $\$50 \times 200$  persons),

unless the organizer can show that the failure to provide the list was due to reasonable cause and not to willful neglect.

Q-3: If an organizer or seller is required to maintain lists for more than one tax shelter in which the same person has acquired interests, how does the penalty apply if the organizer or seller fails to identify the person on each of the lists?

A-3: A separate \$50 penalty applies with respect to the list for each tax shelter on which the person who acquired interests is not identified.

Q-4: Is there a limitation on the amount of the penalty imposed on a seller or organizer required to maintain a list of persons who have acquired interests in a tax shelter?

A-4: Yes. The maximum penalty that may be imposed on a person for any calendar year may not exceed \$50,000.

Q-5: How does the calendar year limitation apply?

A-5: A separate \$50,000 limitation applies to each calendar year in which a failure occurs, and to each tax shelter for which a list is required to be maintained. See A-6 of this section for special rules for determining how the \$50,000 limitation applies to a designated person who fails properly to maintain a list of investors.

*Example 1.* Assume that A, an organizer of a tax shelter, fails to maintain and to provide to the Internal Revenue Service a list of 900 persons who acquired interests in the tax shelter in 1986. In addition, assume that A again fails to maintain and to provide the list of 900 investors upon request in 1987. A is subject to a penalty of \$45,000 ( $900 \text{ persons} \times \$50$ ) for each calendar year in which there is a failure to comply with the requirements of section 6112. Thus, A is subject to \$45,000 in penalties for the failures to maintain and to provide the list in 1986, and \$45,000 in penalties for the failures to maintain and to provide the list in 1987, unless A can show reasonable cause for the failures.

*Example 2.* Assume that B, an organizer of Tax Shelter I, fails to provide a list of 1,500 persons who acquired interests in the tax shelter to the Internal Revenue Service upon request in 1987. Assume also that B, an organizer of Tax Shelter II, fails to provide a list of 2,000 persons who acquired interests in Tax Shelter II to the Internal Revenue Service upon request in 1987. Because the \$50,000 calendar year limitation applies separately with respect to each tax shelter for which a list must be maintained, B is subject to a

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penalty of \$50,000 for failing to provide the list for Tax Shelter I in 1987 and a \$50,000 penalty for failing to provide the list for Tax Shelter II in 1987.

**Q-6:** How does the penalty apply to a designated person?

**A-6:** Separate penalties, each with its own \$50,000 calendar year limitation, apply with respect to the portion of the list kept by the designated person in that person's capacity as organizer and to each portion of the list kept by the designated person in that person's capacity as the designated person with respect to each organizer and seller who signed the agreement under A-12 of § 301.6112-1T and for whom the designated person is responsible for complying with the requirements of section 6112.

*Example.* Assume that X, an organizer and seller, sells interests in a tax shelter directly to 750 investors in 1985. In addition, assume that A, an agent of X, negotiates for X sales of interests in the tax shelter to an additional 500 persons in 1985. If no agreement to designate X is made pursuant to A-11 of § 301.6112-1T, X would be required to maintain a list of the 1,250 investors who acquired interests in the tax shelter (see paragraph (a) of A-8 of § 301.6112-1T) and A would be required to maintain a list of the 500 persons who acquired interests through A (see A-10 of § 301.6112-1T). If, therefore, neither X nor A complied with the requirements of section 6112 in 1985, X would be liable for \$50,000 in penalties (\$50 × 1,250 investors, subject to the \$50,000 maximum) and A would be liable for \$25,000 in penalties (\$50 × 500 investors). Assume, however, that X and A enter into a written agreement to designate X to maintain the list for the tax shelter. Pursuant to that agreement, A submits to X all of the required information regarding the sales to the 500 persons otherwise required to be maintained on A's list and provides the notice required by A-13 of § 301.6112-1T to each person. In 1986, X fails to provide any list of investors to the Internal Revenue Service upon request. For calendar year 1986, X is liable for penalties of \$50,000 in X's capacity as an organizer (\$50 × 1,250 persons, subject to the \$50,000 maximum). In addition, X, as the person designated to maintain the list for A, is liable for penalties of \$25,000 for failing properly to maintain A's list of investors (\$50 × 500 persons). A would not be liable for any penalties.

**Q-7:** If an organizer or seller is subject to a penalty with respect to a tax shelter under section 6708, may the organizer or seller also be liable for other

finances or penalties with respect to the tax shelter?

**A-7:** Yes. The penalty imposed by section 6708 is in addition to any other penalty provided by law. If, for example, an organizer of a tax shelter is subject to a penalty under section 6700 for promoting an abusive tax shelter, the organizer also would be liable for any applicable penalties for failing properly to maintain a list for the tax shelter. Similarly, if an organizer or seller fails to furnish a list upon request by the Internal Revenue Service, the organizer or seller may be subject both to the fine under section 7203 for the willful failure to supply information, and to the penalty for failing properly to maintain a list for the tax shelter.

**Q-8:** When is the penalty under section 6708 effective?

**A-8:** The penalty under section 6708 applies with respect to any interest in a tax shelter which is required to be included on a list under section 6112. See A-22 of § 301.6112-1T.

(Secs. 6112 and 7805, Internal Revenue Code of 1954 (98 Stat. 681; 68A Stat. 917; 26 U.S.C. 6112 and 7805))

[T.D. 7969, 49 FR 34204, Aug. 29, 1984]

### § 301.6712-1 Failure to disclose treaty-based return positions.

(a) *Penalty imposed.* A taxpayer who fails in a material way to disclose one or more positions taken for a taxable year, as required by section 6114 and the regulations thereunder, is subject to a separate penalty for each failure to disclose a position taken with respect to each separate payment or separate income item in the amount of—

(1) For a corporation taxable as such under the Code \$10,000; or

(2) For all other taxpayers, \$1,000.

The penalty imposed by this section may be imposed more than once for a single taxable year if a taxpayer has failed to disclose one or more positions taken with respect to more than one separate payment or separate income item and may be imposed in addition to any other penalty imposed by law. For this purpose, separate payments or income items of the same type (*e.g.*, interest payments) received from the same ultimate payor (*e.g.*, the obligor on the note) will be treated as separate